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POWERS OF CHINESE COURTS

CHAO-LUNG YANG *

The Chinese legal system has recently aroused the interest of not a few Western scholars. But little has been written about the powers of the Chinese courts. It has been said—and it is true—that the Chinese legal system belongs to the Continental type. It will, therefore, be interesting to see in what way it is different from the Anglo-American system. Generally speaking, opinions may differ as to the fundamental features which distinguish the Continental legal system from the Anglo-American. But it may perhaps be said that such features lie more in the sphere of adjective law and legal technique than in the sphere of pure substantive law. True it is that in the sphere of substantive law one may find innumerable differences between the so-called Anglo-American law and the so-called Continental law. But not many of them are really fundamental. The situation is quite different in the sphere of adjective law and legal technique. There the fundamental features of the one can be more easily put in contrast to those of the other. A study of the powers of the Chinese courts, which has much to do with adjective law and is not entirely unrelated to legal technique, will, therefore, make it easier for Anglo-American legal scholars to see where most of the differences between their own legal system and the Chinese legal system lie.

The fact that the Chinese legal system belongs to the Continental type is apt to raise the presumption that the powers of Chinese courts are a mere reproduction of the powers of courts in France, Germany or Austria. This is, however, not true. Though originally modeled upon European legislation, the Chinese law relating to judicial organization and procedure has undergone many changes and adaptations. It will be found that in many instances it is unlike any of the European systems. Thus the present study will also give the students of Continental judicial systems some idea as to how the Chinese system deviates from the Continental models.

An understanding of the powers of courts requires some knowledge of

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the judicial hierarchy. So in order to facilitate the study of the powers of Chinese courts, a brief sketch will be made of the system of courts and their organization. The present study must extend both to questions of judicial procedure and to questions of judicial organization.

Chinese legislation concerning judicial procedures and judicial organization has during the last forty years undergone many changes. As far as judicial organization is concerned, there were promulgated in 1907 the Law of Organization of the Supreme Court, which, meaning much more than what its name indicates, provided for the organization of the Supreme Court as well as the High Court, the District Court, and the Local Court of Peking, the then imperial capital, and in 1908 the Provisional Regulations Relating to Courts, which dealt with the organization and procedure of courts in general. These were partially superseded by a more comprehensive law promulgated and put into force in 1910, known as the Law of Organization of Courts, which was further supplemented by three important regulations, promulgated in the same year, the first governing the examination and appointment of judicial officials (judges and procurators or public prosecutors), the second defining the judicial districts (the territorial jurisdiction of the courts) and the third fixing the respective jurisdictions of district and local courts in general.

The inception of the Republic in 1911 introduced many minor changes in the legislation concerning judicial organization. But the Law of the Organization of Courts promulgated in 1910 remained in force supplemented by subsidiary legislation and regulations until it was entirely superseded by a new Law of Organization of Courts of 1932, which came into force on July 1, 1935. The latter has since the date of enforcement been revised several times and is supplemented by several other laws.

As far as judicial procedure is concerned, the Provisional Regulations Relating to Courts of 1908 remained in force despite the revolution of 1911, were revised and supplemented by other regulations from time to time during the early years of the Republic until they were finally superseded by the Rules of Civil Procedure and the Rules of Criminal Procedure, which, at first enforced in the Manchurian provinces as early as 1922, became afterwards applicable to the whole country. These rules of procedure remained in force until a few years after the establishment of the present Government in Nanking in 1927. The Rules of Civil Procedure were superseded by the Code of Civil Procedure of 1930, which came into force in 1932 and which was replaced in 1935 by another code bearing the same title. The Rules of Criminal Procedure were superseded by the Code of Criminal Procedure of 1928, which remained in force till 1935, when it was replaced by another code of the same nature. The new codes of procedure of 1935 have also undergone many changes, largely as a result of the recent world war.

It would be interesting to study the judicial hierarchy and the powers of courts with reference to the legislative changes during the past four decades. But, as such a study would run over hundreds of pages, an attempt will be made to confine the discussion to the law in force with only such references to the earlier legislation as are necessary for a better understanding of the existing system.

THE JUDICIAL HIERARCHY

As China has been following a unitary system of government, there are no provincial or state courts based on provincial or state law as commonly found in a federal state. The system of courts is with very few exceptions uniform throughout China. It is based upon the same legislation adopted by the Central Government and forms an integral part of one of the five branches of the Chinese polity, the Judicial Yuan. The other four branches of the Chinese polity are the Legislative Yuan, the Administrative Yuan, the Examination Yuan, and the Control (or Supervisory) Yuan. The five-yuan system has grown out of the five-power doctrine of the late Dr. Sun Yat-sen, the revolutionary leader, who was the first to become the President of the Republic of China after the Revolution of 1911. It is a system based upon the traditional political institutions of China with adaptations to modern conditions and intended to avoid the shortcomings of the so-called three-power or two-power system. Professor Roscoe Pound of Harvard has recently written a very brilliant article on the Chinese Constitution, where readers will find a clear and thorough presentation and discussion of the five-power system in China.¹

The Judicial Yuan was established together with the other four yuans toward the end of 1928. At first, it consisted of four organs or systems of organs, namely, (1) the Supreme Court,² under which were the high courts in the provinces or great municipalities and the district courts or their equivalents in the districts or other similar political divisions,³ (2) the Administrative Court, (3) the Commission for the Disciplinary Punishment of Government Officers, and (4) the Ministry of Justice, literally known in Chinese as the Min-

1. Pound, *The Chinese Constitution*, 22 N. Y. U. L. Q. REV. 194 (1947).

2. The Supreme Court and the courts inferior to it are related only judicially, that is to say, in matters of adjudication by way of appeals or reviews. The inferior courts are not subject to the control or supervision of the Supreme Court in matters of administration such as personnel, finance, etc. It should, however, be noted that the Procurator-General of the Supreme Court, as the head of procurators throughout the country, exercises some power of administrative supervision over all the procuratorates attached to the inferior courts.

3. The provinces in China are politically divided into districts or their equivalents. A district is generally about nine hundred square miles in area. Districts with a large population and of political or economic importance have been by special decree of the Government in accordance with the statute governing the subject turned into municipalities.

istry of Judicial Administration. In 1932 the Ministry of Justice was transferred from the Judicial Yuan under the Administrative Yuan, but was transferred back again in 1935. Finally, pursuant to an amendment to the Organic Law of the National Government in the latter part of 1942, it was put under the Administrative Yuan, where it still remains.

The transfer of the Ministry of Justice back and forth between the Judicial Yuan and the Administrative Yuan has been due to an unsettled dispute with regard to the separation of judicial and administrative powers. Whether the Ministry of Justice should come under the one or the other is in the opinion of Chinese legal scholars to be determined by the nature of the powers exercisable by that Ministry. To some, the powers exercisable by the Ministry of Justice are part and parcel of the so-called judicial powers, while to others they constitute a special kind of administrative powers, which, though having to do with judicial organs, are different from judicial powers. According to the theory of the former, the Ministry should be a part of the Judicial Yuan. According to the theory of the latter, it should belong to the Administrative Yuan. The point in dispute has been further complicated by the fact that the late Dr. Sun Yat-sen, the creator of the five-power theory of government, was a little ambiguous in his writings and lectures on this question. It does not seem that he ever clearly and definitely stated that the Ministry of Justice should be part of the Judicial or of the Administrative Yuan.

The Provisional Constitution adopted by the National Convention of 1931⁴ and put into force on June 1 of the same year contains no provision as to what the constituent parts of the five yuans should be. Rather the organization of the different branches of government including the Ministry of Justice has by express provisions of the Constitution (Art. 77) been left to ordinary legislation. It follows that the Organic Law of the National Government, which is one of the fundamental laws made in pursuance of that provision and which provides among other things where the Ministry of Justice should be, can be amended often without the difficulties attendant to the amendment of a rigid constitution.

The New Constitution, adopted in 1946 by the People's National Congress, which will come into force on December 25, 1947, designates the Judicial Yuan as "the highest judicial organ, having jurisdiction over matters of adjudication in civil, criminal, and administrative cases and matters of disciplinary punishment of government officers," without mentioning the functions generally exercisable by a ministry of justice (Art. 77). This would mean that the Ministry of Justice will belong to the Administrative Yuan as it does now. Consequently the new Organic Law of the Administration Yuan enacted by the

4. This National Convention was composed of delegates elected by territorial and professional groups and other organizations throughout the country.

Legislative Yuan in 1947 as legislation supplementary to the New Constitution and due to come into force simultaneously with the New Constitution in 1947 provides in Art. 3 that the Ministry of Justice is one of the subordinate organs of the Administrative Yuan.

The Ministry of Justice has nothing to do with the Administrative Court and the Commission for the Disciplinary Punishment of Government Officers, both of which are of equal rank with the Ministry and are directly subject to the supervision of the Head of the Judicial Yuan. But with regard to the ordinary tribunals or courts of ordinary jurisdiction, namely, Supreme Court, the high courts, and the district courts, the Ministry stands in a different position.

Like most of the courts in European countries, the ordinary tribunals generally consist of two parts, (1) the court proper, that is, that part which is composed of judges and their subordinates and the function of which is principally adjudication, and (2) the procuratorates, that is, that part which is composed of public prosecutors, known in Continental countries as "*procureurs*" or *Staatsanwälte*, whose function is mainly to take part in criminal prosecutions and to represent the public interest in other cases. The head of a court proper is known as the president of the court, while that of a procuratorate is known as the Procurator-General in the case of the procurate of the Supreme Court, and the chief procurator in the case of other tribunals.

The Supreme Court proper is entirely independent of the Ministry of Justice. It is directly subject to the supervision, if any, of the Head of the Judicial Yuan. But all the procuratorates, including the Procuratorate-General, and the high courts and district courts are under the supervision of the Ministry of Justice. So judicially, that is to say, in the exercise of judicial functions, the courts, including the procuratorates, form one hierarchy, while administratively, that is, in matters of administration, such as personnel, finance, coordination and supervision, they are under the jurisdiction of different authorities.

The question has been more than once raised, whether it is necessary to have a ministry of justice or whether it would be better to let the Judicial Yuan or the courts themselves take care of the administrative side of the courts so as to make the judicial tribunals more independent. Careful study by many competent legal scholars in China seems to indicate that although the highest tribunals, such as the Supreme Court proper, the Administrative Court, and the Commission for the Disciplinary Punishment of Government Officers, may be left to take care of their own administrative affairs, there must be some organ or department to take administrative care of the high courts and district courts and the procuratorates, which are very numerous and scattered over the country, in order to assure coordination between the different tri-

bunals, uniformity in personnel administration, and efficiency in work; and that whatever such organ or department might be called, it could not differ much from the Ministry of Justice in nature.

A word or two may now be added about the system and organization of ordinary courts. As has been mentioned above, the ordinary courts are of three grades: (1) the Supreme Court, (2) the high courts, and (3) the district courts. The high courts and district courts may have branch courts. The Law of Organization of Courts of 1932 requires the Supreme Court to be in the national capital (Art. 21). Thus no branch court of the Supreme Court should be established. But during the recent world war it was found necessary to deviate from such provision. By virtue of special legislation such branch courts were established in several sections of the country.

To every court or branch court there is attached a procuratorate. In every district court or branch district court there are one or more notaries-public, who are generally recruited from among persons with the qualifications of a judge or procurator, or who have been in judicial service for a certain period of time. In every district or high court or its branch court there is a public defender, who is recruited from among persons who are or have been judges or procurators with distinguished records. Both notaries-public and public defenders are subject to the supervision of the presidents of the respective courts. In each court there are a number of clerks, who attend to minutes of hearing, filing, statistics, accounts, official correspondence, and numerous other administrative duties; copyists, who copy the documents and attend to other related duties; process-servers, who attend to the delivery of summons, decisions or other court documents in civil cases and other matters related thereto; judicial police, who execute orders of arrest and attend to other matters in criminal cases which in civil cases would be handled by process-servers; and court attendants, who wait upon the judges, procurators, and clerks and maintain order in the courtrooms during hearings. They are all under the supervision of the presidents of the courts or the chiefs of the procuratorates according to whether they belong to the courts proper or to the procuratorates.

It should be noted that not all districts have district courts or branch district courts. The total number of districts in China is approximately two thousand. If there should be for each district a district court or branch district court manned by two to three judges and one to two procurators, the total number of such judges and procurators would be six to ten thousand, a number which it would take many peaceful years to train. The Ministry of Justice formulated soon after the establishment of the present Government in 1927 in Nanking a plan for the gradual establishment of regular courts all over the country. But the whole plan was interrupted by the Japanese attack in

1931, which placed the country in a state of emergency and which was followed by the all-out war begun in 1937 and lasting for eight years. In order to remedy the situation, a more modest scheme was adopted some years ago, whereby district judicial offices have been established one after another in those districts where it has been found impossible to have district courts or branch district courts. A district judicial office differs from a district court or branch district court in only two ways: (1) that there the functions incumbent on a procurator are performed by the district magistrate, the chief executive officer of the district, and (2) that the qualifications for appointment as judges in a district judicial office are lower than those for appointment as judges in a district court or branch district court.

Civil actions are commenced in a district court or branch district court or its equivalent, the district judicial office. Generally two appeals are allowed, the first to the high court and the second to the Supreme Court. But in minor cases only one appeal is allowed. (Art. 463 of Code of Civil Procedure) Criminal actions are in most cases commenced in a district court or branch district court or its equivalent. In a small number of cases they are commenced in a high court or branch high court. Such cases include those involving treason, offenses endangering the external security of the Republic or the relation between the Republic and a foreign state, and other analogous offenses. (Art. 4 of Code of Criminal Procedure; Art. 1, paragraph 2 of Rules of Procedure Governing Special Criminal Cases) No judgment of a high court or branch high court in a civil or criminal case can be appealed except on the ground of misinterpretation or misapplication of law by those courts.

POWERS OF COURTS

The powers of courts may be placed in two classifications: (1) ordinary powers, including such powers as ordinarily belong to judicial tribunals, namely, the power to adjudicate cases, the power to execute decisions or orders reached in the course of adjudication, and the power to deal with matters which are technically considered as of a "non-contentious" nature, such as registration of immovables, probate of wills, and bankruptcy proceedings, and (2) special powers, including such powers as by special provision of law vest in the courts. Of the former only four are worthy of special mention here. They are (1) the power relating to the commencement or prosecution of actions, (2) the power relating to the trial of cases, (3) the power relating to decision of cases, and (4) the power over appeal of cases.⁵

The commencement or prosecution of a civil action is exclusively the

5. What follows aims at only describing the general framework of some phases of the Chinese court system. No attempt will be made to go into details which should be examined in a systematic treatise on the subject.

business of private interested parties and, therefore, need not be discussed here. What is to be pointed out is rather the power relating to the prosecution of a criminal action. The power of prosecuting a criminal action is, in cases where no individual is involved as an injured party or where no private interest is directly affected, exercised exclusively by the procurator. In this regard, the procurators under the Chinese system differ from both the state attorneys or public prosecutors under the Anglo-American system and the officers constituting the *ministere public* under the Continental system. They have not only the power to prosecute a criminal action, but also an important power incidental thereto which is exercised generally, under the Continental system, by a *judge d'instruction* and, under the Anglo-American system, by a committing magistrate, a coroner and his jury, or a grand jury, namely, the power to hold preliminary examination of the accused and the witnesses so as to decide whether the case should be prosecuted or not. In exercising this power they may summon, arrest, and detain the accused, compel witnesses to appear, and make such searches and investigations as serve to throw light on the case. In short, they have all the powers that a French *judge d'instruction* possesses. Upon the conclusion of the preliminary examination, a procurator may decide either to prosecute or not to prosecute the case.⁶ If the latter course is adopted, the complainant may, upon receiving a notice to that effect, which is in the form of an official document, generally file an application for reconsideration of the decision.⁷ Such an application will first go to the procurator who made the decision. The latter, if of opinion that the application is well grounded, shall set aside the decision and continue the preliminary examination or institute prosecution, as the case may be; but, if of opinion that the application is groundless, he shall transmit the record, documents, and evidence of the case to the chief procurator of the immediate superior court for reconsideration. Upon the filing of an application for reconsideration,⁸ the chief procurator of the court of which the procurator originally in charge of the case is a member may, before forwarding the case to the chief procurator of the superior court for reconsideration, undertake himself to re-examine it or designate another procurator to do so. But if the original decision of non-prosecution is upheld by such other procurator, the case should without delay be forwarded to the chief procurator of the immediate superior court for reconsideration.⁹ The chief procurator of such court may, in reconsidering the case, either dismiss the application of the complainant, if he considers it to be groundless, or order the procurator of the court below to continue the preliminary examination with a view to reaching a sounder decision or to institute prosecution of the

6. CODE OF CRIMINAL PROCEDURE, arts. 230-233.

7. *Ibid.*, art. 235.

8. *Ibid.*, art. 236, §§ 1-2.

9. *Ibid.*, art. 236, § 3.

case.¹⁰ If the procurator of the court below, after continuing the preliminary examination, again decides not to prosecute the case, the complainant may apply for a second reconsideration.¹¹

Unlike the French procurator, the procurator under the Chinese system may withdraw the prosecution after it is instituted. This should, however, be done before the conclusion of oral debate in the court of first instance.¹² The withdrawal of a criminal action by the procurator has the same effect as the decision of non-prosecution by the same officer upon the conclusion of the preliminary examination. Thus the same remedy which is open to a complainant in case of a decision of non-prosecution is open to him again in case of the withdrawal of a criminal action.¹³

The procurator also has the power to appeal from a judgment or order of the court. Such appeal may be filed either for or against the interest of the accused.¹⁴ Where a judgment has become absolute so that it is non-appealable, the procurator may either for the interest of the accused or of law resort to an extraordinary appeal or to an application for new trial. The nature of an extraordinary appeal is similar to that of an appeal in the interest of law under the French system (*pourvoi dans l'intérêt de loi*). Like an appeal in the interest of law under the French system, it can only be made by the Procurator-General of the Supreme Court.¹⁵ It has to be filed with the Supreme Court. Such an appeal should be based on the ground that the judgment appealed from or the proceeding leading to such judgment is illegal.¹⁶ If the Supreme Court is of opinion that the appeal is groundless, it shall be dismissed. Otherwise, one of the following judgments shall be rendered:¹⁷

1. A judgment setting aside that part of the original judgment which is illegal, if the illegality lies in the judgment itself but is not detrimental to the accused;
2. A judgment substituting the original judgment as a whole, if it is illegal and at the same time detrimental to the accused;
3. A judgment avoiding the proceedings, if the illegality only lies there.

Such an appeal may be said to be provided for mainly in the interest of law. For, except where the original judgment appealed from is illegal and at the same time detrimental to the accused, a judgment rendered in connection

10. *Ibid.*, art. 237.

11. INTERPRETATION OF JUDICIAL YUAN, No. 82, May 6, 1929.

12. CODE OF CRIMINAL PROCEDURE, art. 248.

13. *Ibid.*, art. 249.

14. CODE OF CRIMINAL PROCEDURE, arts. 336, 412.

15. But in France an exception exists where the *procureurs généraux* in the *cours d'appel de la Martinique et de la Guadeloupe* may also exercise this right. GOYET, G., LE MINISTÈRE PUBLIC, 389.

16. CODE OF CRIMINAL PROCEDURE, art. 434.

17. *Ibid.*, art. 440, ¶ 1.

with an extraordinary appeal does not affect the accused.¹⁸ It may be noted that in this respect the extraordinary appeal, as far as the accused is concerned, is more like the appeal for excess of power (*pourvoi pour excès de pouvoir*) than the appeal in the interest of law under the French system. For according to French jurisprudence, while an appeal in the interest of law has no effect whatsoever on the rights of the parties to the action, an accused person is entitled to the benefit of a judgment rendered in connection with an appeal for excess of power, if his position is improved thereby.¹⁹

A procurator also has the right to apply for a new trial where, after a judgment becomes absolute, some new facts are discovered or verified which will invalidate the proceedings or which would have changed the judgment had they been known before it was rendered. The application for new trial may be made either for or against the interest of the accused.²⁰

Cases other than those to be prosecuted exclusively by a procurator may be prosecuted by the injured parties, unless the prosecution is directed against a lineal relation or a spouse.²¹ Where a case is pending before the court as a result of private prosecution, the injured party or other person who can act on behalf of him has no longer the right to make complaint directly or through some other organ to a procurator about the same matter, thereby asking for the institution of public prosecution.²² On the other hand, where a case has been subject to the preliminary examination of a procurator, which examination has been completed, private prosecution is no longer permitted in connection therewith. But where private prosecution takes place before the completion of such preliminary examination, it has the effect of superseding such preliminary examination and the procurator has to stop before continuing the proceedings in connection therewith.²³

The next point to be considered is the power relating to the trial of cases. It is impossible to go into the details of this point. For to do so would necessitate a statement of a large part of the rules of both civil and criminal procedure, which would be far beyond the scope of the present article. Therefore, only a few of the fundamental features will be mentioned. These features fall into two groups, namely, (1) those common to both civil and criminal cases and (2) those confined to one of them. Of the former four may be mentioned. The first is that no cognizance shall be taken of any case, whether civil or criminal, until and unless an action has been properly commenced by a plaintiff or a prosecutor. In civil cases this is so plain that no explanation is neces-

18. *Ibid.*, art. 441.

19. Goyet, *op.cit.*, 390.

20. CODE OF CRIMINAL PROCEDURE, arts. 443-445.

21. *Ibid.*, arts. 311, ¶ 1, 313.

22. *Ibid.*, art. 316.

23. *Ibid.*, art. 315.

sary. For they concern only private interests and no interference on the part of the court is necessary until the wheel of justice is set in motion by an interested party. In criminal cases, the same principle has been provided for with a view to preventing abuses that may possibly result from the vesting of the powers of both prosecution and punishment in the same person. It means generally that any offense, no matter where, when, and against whom it has been committed, has to be duly prosecuted either by a procurator or by an injured party having the right of prosecution before it can become the subject of trial. Thus, where a crime has been committed in the presence of, or against, the judge, or has been discovered by him in the course of performing his duties, as in the case of obstruction of the exercise of official duties, perjury, or malicious prosecution, he can only inform the procurator of the offense; the procurator will then start a preliminary examination to decide whether or not there is ground for prosecution, or if the case permits of private prosecution, institute prosecution as a private prosecutor. To this general rule there is, however, an exception, namely, that where any person causes obstruction of the exercise of judicial function by the court or commits in the presence of the court, sitting as such, other improper acts at the time of trial, the presiding judge or the judge in charge of the case may, when necessary, aside from ordering such person to leave the courtroom or having him kept in custody until the adjournment of the court, summarily and without being subject to appeal impose upon him a punishment not exceeding three days' detention or a fine not exceeding ten dollars.²⁴

The second feature is that both in civil and criminal actions, the court, in trying cases, has the power and is under obligation to investigate of its own initiative whether the cases are within its jurisdiction.²⁵ If it appears that a case is beyond its jurisdiction, it shall forthwith transfer it to the competent court by a ruling to that effect.²⁶

The third feature is that the procedure relating to trial is dominated by the principle of "judicial prosecution" (*Offizialbetrieb*) rather than that of "party prosecution" (*Parteibetrieb*). In civil cases²⁷ the following examples may be cited:

24. LAW OF ORGANIZATION OF COURTS, arts., 69, 70.

25. See CODE OF CIVIL PROCEDURE, art. 28, § 1. The Code of Criminal Procedure of 1928 provides in art. 5 that the court shall of its own initiative ascertain whether it has jurisdiction over a criminal case. The Code of Criminal Procedure of 1935 contains no such provision. But as there is no such thing as "jurisdiction by consent of the parties" as in civil cases, any mistake in jurisdiction constitutes a violation of law and is a ground for appeal to the Supreme Court. (See Art. 371) Obedience to law makes it obligatory on the court to inquire into jurisdictional questions of its own accord.

26. CODE OF CIVIL PROCEDURE, art. 28, § 1; CODE OF CRIMINAL PROCEDURE, art. 226.

27. It may be pointed out that in this respect the Chinese civil procedure is based upon the Austrian Code of Civil Procedure of 1895 and differs from the system adopted by

1. Where petitions filed by the parties are irregular either in form or otherwise, the presiding judge or the judge in charge of the case shall by a ruling order that the necessary amendments be made.²⁸
2. Where upon the suspension of proceedings due to some legal cause the person who should succeed to the action delays in doing so, the court may *mutu proprio* order him to succeed to the action.²⁹
3. Where a party, prior to the conclusion of oral debate, puts forth means of attack or defense with the intention of delaying the proceedings, the court may overrule the means so put forth.³⁰
4. The proceedings of oral debate, including the examination of witnesses and experts, questioning of parties, etc., are conducted and controlled by the judge, and a party or his counsel can put questions to the other party, the witnesses, or experts only through or with the permission of the judge.³¹
5. For the purpose of better determining the relation between the parties to an action, the court may at any time take any of the following steps:—
 - (1) Require the parties or their legal representatives to appear in person,
 - (2) Order the production by the parties of certain books, designs, documents, or other things,
 - (3) Order the deposit of documents and other things by the parties or third parties in the court, or
 - (4) Collect or investigate or order the collection or investigation of evidence or order testimony by experts or make inspection.³²
6. Where the court believes that in the presence of a party a witness cannot state fully what he has to say, such party may be ordered to withdraw from the courtroom; but after the witness has finished his statement, the presiding judge shall advise the party what the witness has stated.³³

In criminal cases the same principle is illustrated by the following provisions:

1. In examining the accused, the court shall give him an opportunity for clearing away from himself the suspicion of having committed the crime and for making statements of facts advantageous to himself and

the French and the Anglo-American common law. See CONTINENTAL LEGAL HISTORY SERIES, Vol. 7, HISTORY OF CONTINENTAL CIVIL PROCEDURE, 24-26, 635-636; MOREL, TRAITE ELEMENTAIRE DE PROCEDURE CIVILE 462-464 (1932).

28. CODE OF CIVIL PROCEDURE, art. 121.

29. *Ibid.*, art. 178.

30. *Ibid.*, art. 196.

31. *Ibid.*, arts. 198-200.

32. *Ibid.*, art. 203.

33. *Ibid.*, art. 321.

tell him to state continuously such facts and to produce evidence to support them.³⁴

2. Where the accused has confessed the commission of crime, the judge shall still make necessary investigations so as to ascertain whether the confession is in accord with fact.³⁵
3. After examination of the accused, the presiding judge or the judge in charge of the case shall investigate the evidence.³⁶
4. The court shall show the accused the things used as evidence and, if such things are documents or something written which the accused cannot understand, the essential points stated therein shall be made known to him.³⁷
5. Examination of witnesses and experts shall take place according to the following order:³⁸
 - (1) Examination by the presiding judge or the judge in charge of the case,
 - (2) Examination-in-chief by the party or the counsel for the defense upon whose application the witnesses or experts have been summoned,
 - (3) Cross-examination by the other party,
 - (4) Redirect-examination by the party or the counsel for the defense upon whose application the witnesses and experts have been summoned.
6. The presiding judge or the judge in charge of the case may stop any question put to a witness or expert which he considers improper or irrelevant. He may also continue questioning the witnesses or experts after they have been examined by the parties.³⁹
7. Where the presiding judge or the judge in charge of the case anticipates that in the presence of the accused a witness, expert, or joint-accused will not freely state what he has to say, the accused may be ordered to withdraw from the courtroom until the conclusion of the examination; provided that upon the examination's being concluded the accused shall be brought into the courtroom again and told the essential points of the testimony given by such witnesses, expert, or joint-accused.⁴⁰

34. CODE OF CRIMINAL PROCEDURE, art. 96.

35. *Ibid.*, art. 270, ¶ 2.

36. *Ibid.*, art. 267.

37. *Ibid.*, art. 271.

38. *Ibid.*, art. 273.

39. *Ibid.*, art. 274.

40. *Ibid.*, art. 276.

8. In case of necessity the court may order the re-opening of the oral debate after it has been concluded.⁴¹

The fourth and last feature is publicity of trial. This is provided for by Art. 55 of the Law of Organization of Courts of 1910, which states that the oral debate and the pronouncement of judgment of a case shall take place by means of a public proceeding. To this principle there is only one exception, which is to be found in the case where publicity of proceeding will menace public order or good morals. Whether such a case exists or not is a question for the court to decide. When the court considers that such a case exists and decides to hold a secret proceeding, its decision as well as the grounds therefor should be announced to the public. In excluding the public from the courtroom, the presiding judge or the judge in charge of the case may, however, allow such persons as are deemed proper to remain there during the trial.⁴²

A departure from the principle of publicity of trial not in accordance with law has the effect of nullifying the proceedings, when attacked by the parties, and is a ground for appeal.⁴³

Of the features peculiar to the power of the court in civil cases with respect to trial two may be mentioned. The first is that the court may proceed with a case in the absence of the defendant or his representative when he fails without justifiable cause to appear or to be represented by an agent *ad litem* at the date of oral debate after being duly summoned. In so doing, the court may, in a case where a party has been twice absent after being duly summoned, even act *mutu proprio* without having to wait for the application of the party present. But the judgment rendered under such circumstances should be based upon the petitions, answers, or documents already filed by the parties, if there are any; and it does not necessarily follow that it is in all cases against the absent party.⁴⁴ The second is that the court may at any time attempt a compromise between the litigants in order to reach an amicable settlement. The agreement reached as a result of such compromise is as binding as a definitive judgment.⁴⁵

Of the special features of the power of the court with regard to trial in criminal cases three may be mentioned. These stand in contrast to the features of, or are without parallel in, that with regard to civil cases. First of all may be mentioned the principle that no trial shall take place in the absence of the accused and any judgment based on such a trial is void.⁴⁶ To this principle there are two important exceptions. The first is the case where the maximum punish-

41. *Ibid.*, art. 284.

42. LAW OF ORGANIZATION OF COURTS, arts. 65, 68.

43. CODE OF CIVIL PROCEDURE, art. 466; CODE OF CRIMINAL PROCEDURE, art. 371.

44. CODE OF CIVIL PROCEDURE, art. 385.

45. *Ibid.*, arts. 377, 380.

46. CODE OF CRIMINAL PROCEDURE, arts. 261, 371.

ment for the offense in question does not exceed detention or fine. In such a case the accused may be represented by an agent ad litem without affecting the validity of the proceedings.⁴⁷ The second is the case where the offense is punishable according to the "summary proceeding" by a penal order given *in camera*. In such a case, the accused, not being satisfied with the penal order, may apply for a regular trial within five days from the receipt of the order. If on the day set for the regular trial he, after being duly summoned, fails to appear without justifiable cause, the court may forthwith render a judgment dismissing the application, which will have the effect of a judgment based upon a regular trial at which the accused is present. The punishment infictable in such a case shall not exceed six months' imprisonment.⁴⁸

In the second place, it is worthy of note that in criminal trials there is no legal provision for conciliation. Unlike the German system,⁴⁹ the Chinese Code of Criminal Procedure contains no express provision for any attempt either by the court or by some other public organ to bring about a conciliation between the parties to a criminal action. But as the absence of such a provision does not always make it unlawful for the court to attempt such a thing, instances are not uncommon where this is done when the case in question is to be left entirely to the initiation of an injured party or a person having the right of complaint.

Finally, there is the feature that the court, in trying a criminal case, may at the same time entertain a subsidiary civil action brought by the injured party or his representative for damage sustained. Such a civil action may be directed against not only the accused, but also such persons as may be held civilly liable for the act of the accused.⁵⁰ For instance, where a criminal action has been instituted against a chauffeur for having caused the death of another person by negligently driving a car, a subsidiary civil action may be brought against

47. *Ibid.*, arts. 36, 260. In this respect, the Chinese system is based on that of the German Code of Criminal Procedure of 1877 as it then stood. See Arts. 229, 318, 319, 322, 324. It will be noticed that it differs from both the French and the Austrian systems in two important respects. In the first place, unlike the French and the Austrian systems, it does not recognize the so-called procedure of "contumacy," by virtue of which cases involving serious offenses, technically known as "crimes," may be adjudged in the absence of the accused upon fulfillment of certain requirements prescribed by law, such as public summons, etc. (FRENCH CODE D'INSTRUCTION CRIMINELLE, arts. 465-470; AUSTRIAN CODE OF CRIMINAL PROCEDURE, arts. 422-427) In the second place, contrary to the French and the Austrian systems, especially the former, it permits the so-called judgment by default only in cases involving punishment by detention or fine and cases of first appeal instead of allowing it in all cases involving delicts and contraventions, as under the French system, or in all cases generally involving contraventions, as under the Austrian system. ROUX, *PRECIS ELEMENTAIRE DE DROIT PENAL ET PROCEDURE PENAL*, 314; *Garraud Traite theorique et pratique d'instruction criminelle et de procedure penale*, vol. 4, 496; Austrian Code of Criminal Procedure, art. 459.

48. CODE OF CRIMINAL PROCEDURE, art. 442.

49. The German Code of Criminal Procedure of 1877 requires most cases of private prosecution to go through the process of conciliation before a public organ charged with this function prior to the commencement of actions. (Art. 420)

50. CODE OF CRIMINAL PROCEDURE, art. 491.

both the accused and the employer who, according to Art. 188 of the Civil Code, may be held jointly liable for the damages so caused. So far as the civil claims are concerned, such an action is comparable to the action instituted by a *partie civile* (*Privatbetheiligter*) under the French and the Austrian law. But in its relation to the criminal action to which it is joined, it differs from the latter in some important aspects. First, unlike the action instituted by the *partie civile* under the French law, it does not have the effect of thereby instituting a public prosecution.⁵¹ In fact, this is utterly inconceivable under the Chinese law, since a subsidiary civil action presupposes a criminal action that has already been instituted. Secondly, unlike the Austrian *partie civile*, the plaintiff of the subsidiary civil action can not step into the place of the procurator and prosecute the criminal action when the procurator abandons the prosecution either before or after the commencement of such action.⁵²

The third point to be considered is the power of the court relating to decision of cases. In this connection, three features may be mentioned. The first is that the judgment of a court should be confined to the points alleged in an action. This means in a civil case that the court should not in its judgment pass upon any matter not alleged by the parties, whether plaintiff or defendant.⁵³ An exception exists, however, where the law invests the court with the power to pass upon matters not alleged by the parties. This is, for example, true of the question of incidence of the liability for costs⁵⁴ and the order of provisional execution of certain kinds of judgments, such as judgment ordering the defendant to fulfill the obligation of maintenance of another person or a judgment against the defendant in any of the cases which, by virtue of the nature of legal relation existing between the plaintiff and the defendant, instead of the pecuniary value of the subject matter, are subject to summary proceedings.⁵⁵ All such matters may be passed on by the court *mutu proprio* in its judgment. The same rule, when applied to criminal cases, would mean that the court should pass judgment on no act other than such as has been alleged in the "act of accusation" to have been done by the accused.⁵⁶ This does not, however, prevent a judge from applying to an act so alleged in the act of accusation a provision of law different from the one cited by the prosecutor. Consequently, if the facts alleged in the act of accusation constitute a crime to which a legal provision other than the one cited is

51. ROUX, *op. cit.*, 267-268.

52. AUSTRIAN CODE OF CRIMINAL PROCEDURE, arts. 48-49.

53. CODE OF CIVIL PROCEDURE, art. 388.

54. *Ibid.*, art. 87.

55. *Ibid.*, art. 389. In case of a judgment ordering the fulfillment of the obligation of maintenance, no provisional execution should be ordered *mutu proprio* unless such obligation has become due during the six months prior to the commencement of action or in the course of the proceedings.

56. CODE OF CRIMINAL PROCEDURE, art. 247.

applicable, the court may convict the accused according to such other legal provision.⁵⁷

The second feature in connection with the decision of cases is that in rendering a judgment the court is not bound by strict rules regarding the probative force of evidence, but rather guided by its own conviction. This principle is adopted by both the Code of Civil Procedure and the Code of Criminal Procedure, having its origin in the doctrine of "moral proof" to which most of the Continental procedural laws are consecrated.⁵⁸ The Code of Civil Procedure provides in Article 222 as follows: "Except where it is otherwise provided by law, the court shall decide the truthfulness of facts according to its moral conviction by taking into consideration the purports revealed in the whole course of debate and the results of investigation of evidence. The reasons on which the moral conviction is based shall be stated in the judgment."⁵⁹ The Code of Criminal Procedure contains similar provisions in the following articles:

Art. 268. The facts constituting a crime shall be determined according to evidence.

Art. 269. Evidence shall be evaluated by the court according to its moral conviction.

Lastly may be mentioned the feature that the court should state in its judgment the grounds for its decision.⁶⁰ The rule is to be strictly enforced. Consequently, failure to comply with it has the effect of nullifying the judgment and constitutes a ground for appeal.⁶¹

The fourth and last point to be considered with respect to the power of the court is the power over appeal cases. Appeals are of two kinds, (1) those against judgments and (2) those against rulings or orders other than judgments. It is with the power over the former class of cases that the present study is concerned. This power may be looked at from three angles, namely, (1) the matters to be passed upon in appeal, (2) the trial, and (3) the judgment.

As to matters to be passed upon in appeal, the power of the court is governed by two principles. The first is that in sitting as a judicial tribunal of second instance, that is to say, of first appeal, a court has power to pass upon both questions of fact and questions of law, but in sitting as a judicial tribunal of third instance, that is to say, of second appeal, it has only power to pass

57. *Ibid.*, art. 292.

58. CONTINENTAL LEGAL HISTORY SERIES, Vol. 7; HISTORY OF CONTINENTAL CIVIL PROCEDURE, 45-46, 609, 633; *Ibid.*, Vol. 5; HISTORY OF CONTINENTAL CRIMINAL PROCEDURE, 627-630.

59. There are a few exceptions to this rule, which have to do with the authenticity of public documents, the presumption of certain facts.

60. CODE OF CIVIL PROCEDURE, art. 226; CODE OF CRIMINAL PROCEDURE, art. 202.

61. CODE OF CIVIL PROCEDURE, art. 466; CODE OF CRIMINAL PROCEDURE, art. 371.

upon questions of law.⁶² Thus, while an appeal from a judgment rendered by a court of first instance may be based on the ground that such court has erred in both the finding of fact and the interpretation or application of law or in either of these, an appeal from a judgment of a court of second instance may be based only on the fact that there has been some violation of law by such court in conducting the proceedings or in giving the judgment. By violation of law is generally meant the omission to apply law or the improper application of law.⁶³ The question whether there is under a given circumstance such an omission to apply law or improper application of law as to constitute a violation of law is left to free decision of the competent court before which an appeal case is pending. But in order to prevent ill consequences that may flow from difference of opinion, certain circumstances have been expressly declared by the Code of Civil Procedure or the Code of Criminal Procedure to be violations of law, which may in all cases serve as grounds for second appeal.⁶⁴ Although a second appeal is always confined to a case where there has been a violation of law, yet not every case where there has been a violation of law admits of such appeal. According to the Code of Criminal Procedure, where the irregularity of procedure apparently has no effect upon the judgment, unless it is one expressly declared to constitute a violation of law, it should not be taken as a ground for second appeal.⁶⁵ In civil cases the principle seems also to be well settled that a violation of law having no causal relation with the judgment serves as no ground for second appeal.⁶⁶

The second principle governing the power of the court as to matters to be passed upon in appeal is that the court, in trying and deciding a case, should confine itself to such points as are covered or brought into issue by the appeal.⁶⁷ In criminal cases, where the appellants are not required to state reasons for appeal in the memorandum of appeal, it is sometimes, however, difficult to determine whether an appeal is from a part or whole of the judgment rendered by the court below. In order to avoid dispute, the following provision has been inserted in the Code of Criminal Procedure:⁶⁸

"An appeal may be made against a part of the judgment; but in the absence of any circumstance showing that it is limited to any part of the judgment, it shall be deemed to have been made against the whole judgment.

"An appeal made against a part of the judgment which is connected with other parts shall be deemed to have been made also against such other parts."

62. CODE OF CIVIL PROCEDURE, arts. 44, 64, 73; CODE OF CRIMINAL PROCEDURE, art. 369.

63. CODE OF CIVIL PROCEDURE, art. 465; CODE OF CRIMINAL PROCEDURE, art. 370.

64. CODE OF CIVIL PROCEDURE, art. 466; CODE OF CRIMINAL PROCEDURE, arts. 371, 373.

65. CODE OF CRIMINAL PROCEDURE, art. 372.

66. SUPREME COURT DECISIONS, 1914, No. 33; 1915, No. 1521.

67. CODE OF CIVIL PROCEDURE, arts. 442, 472; CODE OF CRIMINAL PROCEDURE, arts. 358, 385.

68. Art. 340.

The question may be raised, How far can a court of appeal go with regard to the points covered or brought into issue by the appeal? This in turn leads to two other questions: (1) how much freedom or power the court may exercise in its finding of facts and determination of law and (2) how much freedom or power it may exercise in rendering a judgment. As to the first, it may be said that, in case of first appeal the court has all the powers that a court of first instance may exercise, including the power to act *mutu proprio* in the finding of facts and determination of law without being bound by the opinions of parties and that, in case of second appeal, where only questions of law are raised, the court has all the powers necessary for and incidental to the determination of whether there has been a violation of law on the part of the court below, including the power to proceed *mutu proprio* to the investigation (without taking new evidence) of facts settled by the court below and the examination of proceedings taking place in the court below in order to determine if there has been any omission to apply law or misapplication of law without being bound by the opinions of the parties.⁶⁹ As to the second, there are many points to be considered. But of these only one needs to be discussed here, namely, under what circumstance a court of appeal can modify the judgment appealed from to the detriment of the appellant. Here the principle differs according to whether the case is a civil or criminal one. If it is a civil case, the court has no power to modify the original judgment to the detriment of the appellant unless there is a counter-appeal on the part of the appellee. In the absence of such a counter-appeal, there are only two alternatives open to the court. It has either to uphold the original judgment by dismissing the appeal or to modify or reverse the same in favor of the appellant. Thus, even though the original judgment should, according to law, have been rendered in such a way as to be more disadvantageous to the appellant, the court of appeal should not make it so until and unless the appellant avails himself of the opportunity in due course of time.⁷⁰ The principle on which this is based is that in civil litigations it should be left to the parties to decide whether a certain step should be taken for their own interest.⁷¹

But if the case is a criminal one, the rule is different. Here the procedure is generally dominated by the doctrine of judicial interference because of the public interest involved. The court of first appeal has generally the power to modify or reverse a judgment to the advantage or disadvantage of the accused. In exercising such power, it is subject only to one limitation, namely, that where the appeal is made by the accused or by someone else for his benefit, the original sentence should not be increased by the court of first appeal except

69. CODE OF CIVIL PROCEDURE, arts. 442, 460, 473, 478; CODE OF CRIMINAL PROCEDURE, arts. 356, 358, 379, 385, 386.

70. SUPREME COURT DECISIONS, 1915, No. 591; 1917, No. 603.

71. SUPREME COURT DECISIONS, 1914, No. 574; 1919, No. 1420.

on the ground of improper application of law or improper imposition of a light sentence by the court below.⁷² The power of the court of second appeal (that is, the court of third instance) is narrower than that of the court of first appeal in that it can render a judgment of its own on the merits of the case after reversing the judgment of the court below only in a limited number of cases.⁷³

Next to be considered is the power of courts relating to trial of appeal cases. In general, the rules governing trial in a court of first instance are applicable *mutatis mutandis* to a trial in a court of appeal. But there are many aspects in which the trial of an appeal case differs from that of a case in the first instance. Of these only two will be mentioned. The first is that a case of second appeal is, as a rule, decided by record. In other words, the judgment is rendered by the court without going through the stage of oral debate. Consequently, the rules governing the trial in the court of first instance are inapplicable. But this does not mean that oral debate is forbidden in the court of third instance. On the contrary, whenever deemed necessary, the court may order it to take place. In such a case, the procedure would be the same as that occurring in a court of first instance with the following important exceptions:⁷⁴

1. That the court should confine itself to questions of law; and
2. That where the case is a criminal one the person acting as defender or agent ad litem of the accused in the oral debate must be a lawyer.

The second aspect in which the trial of an appeal case differs from that of a case in the court of first instance is that in any criminal appeal case, trial may take place in the absence of the accused, if he fails to appear after being duly summoned.⁷⁵ The reason for this is that the presence of the accused in the trial of an appeal case is sometimes not indispensable and, therefore, strict compliance with the rule that no trial should take place in the absence of the accused is unnecessary.

The final point to be considered is the power of court relating to judgment in appeal cases. As much of what has been said in connection with the matters to be passed upon is applicable to this point, what remains to be done is to discuss generally only one question, namely, what the court should do (1) in case it finds the judgment appealed from justifiable and (2) in case it finds it otherwise. In the first case, the step to be taken is very simple. It is but to dismiss the appeal, thereby upholding the appealed judgment. But in the second case, different steps may be taken. Summarized, they are of two kinds: (1) substituting the original judgment in part or in whole with a new judgment on the merits of the case and (2) setting aside partially or wholly

72. CODE OF CRIMINAL PROCEDURE, art. 362.

73. CODE OF CRIMINAL PROCEDURE, arts. 390, 393.

74. CODE OF CRIMINAL PROCEDURE, art. 381; CODE OF CIVIL PROCEDURE, art. 471.

75. CODE OF CRIMINAL PROCEDURE, art. 363.

the original judgment and remitting the case to the original court or to some other court of equivalent grade for retrial. The details relating to these points are not the same in civil and criminal cases. In order to avoid confusion, they will be stated separately.

In civil cases, it is generally the rule for a court of first appeal to substitute a new judgment for the original one either by modifying a part of it or by changing it altogether.⁷⁶ The setting aside of the original judgment in part or in whole coupled with the remission of the case to the original court or a court of equivalent grade takes place only as an exception and only under one of the following circumstances:

1. Where appeal is taken with sufficient ground against a judgment on the ground of violation of the rules governing exclusive jurisdiction by the court below; or

2. Where the procedure in the court of first instance is found to be materially erroneous and for the purpose of maintaining the prescribed order in which a case should proceed from one grade of court to another it is necessary to remit the case for retrial.

Under the first circumstance, the remission of the case to the court of first instance for retrial is obligatory, but under the second it is optional to the court and the parties who may by common consent have the case decided on its merits by the court of first appeal.⁷⁷ Usually a remitted case is tried again in the original court of first instance; but where the original judgment is set aside on the ground of lack of jurisdiction, it should be remitted for retrial to another court of the same grade which has jurisdiction over it.⁷⁸

In civil cases of second appeal, the substitution of a new judgment for the original one takes place as a matter of course in one of the following circumstances:⁷⁹

1. Where the original judgment is set aside on the ground of omission to apply law or misapplication of law to the settled facts and the case is ready for a judgment on the merits; or
2. Where the original judgment is set aside on the ground that the case is not within the jurisdiction of ordinary courts.⁸⁰

Under all other circumstances, a judgment should be rendered whereby the case will be remitted to the original court of second instance or a court of the same grade, as the circumstances may require.

76. CODE OF CIVIL PROCEDURE, art. 447.

77. *Ibid.*, arts. 448, 449.

78. *Ibid.*, art. 449, ¶ 2.

79. *Ibid.*, art. 476.

80. In this case the only thing to be done is to render a judgment dismissing the action, as it is beyond the power of the court of second appeal as an ordinary tribunal to render a decision which should bind special tribunals.

In criminal cases, the general rule is that a court of first appeal, if of opinion that the judgment of the court of first instance is not justifiable, should substitute it in part or in whole with a new judgment on the merits of the case. It is only under one of the following circumstances that a judgment remitting the case to the original court or some competent court for retrial is rendered:

1. Where the court of first instance has erred in rendering a judgment of non-prosecution or non-suit or dismissing the case on the ground of lack of jurisdiction; or
2. Where the court of first instance has failed to dismiss the case on the ground of lack of jurisdiction when it ought to have done so.

Under the first circumstance, remission of the case to the court below for retrial is optional. In other words, if the court of first appeal considers that there is no practical necessity for such a course, it may substitute the original judgment with a new one on the merits of the case. Under the second circumstance, the reverse is true. But where the court of first appeal according to law ought to have tried the case as a court of first instance, it should assume jurisdiction over the case in such capacity and substitute for the original judgment a new one on the merits of the case.⁸¹

In criminal cases of second appeal, the substitution of a new judgment on the merits of the case for the original judgment either in part or in whole takes place under one of the following circumstances:

1. Where the original judgment is contrary to law and the facts of the case can be ascertained from the original judgment;
2. Where the case should be dismissed on the ground of non-prosecution or of non-suit due to reasons other than jurisdictional;
3. Where the punishment that may be imposed has in the meantime been abolished, modified, or remitted; or
4. Where the case has been affected by amnesty or the accused has died after the judgment has been appealed.⁸²

Under all other circumstances, a judgment should be rendered whereby the case will be remitted either to the original court of second or first instance or some other competent court of same grade, as conditions may require.⁸³

A judgment remitting a case to the court below for retrial is binding on the court to which the case is remitted either immediately or after lapse of the period for appeal—immediately when rendered by a court of third instance

81. CODE OF CRIMINAL PROCEDURE, art. 361. For example, in a case involving offense against the internal or external security of the State, the high court or its branch court should sit as a court of first instance. If a district court has erred in entertaining such case, the high court or its branch court may on appeal substitute a new judgment on the merits of the case for the judgment of the district court.

82. *Ibid.*, arts. 390, 392.

83. *Ibid.*, arts. 391-393.

and after lapse of the period for appeal when rendered by a court of second instance.⁸⁴

The ordinary powers of courts having been treated, an examination of their special powers is in order. This will be done under three heads: (1) the power to unify the interpretation of laws and ordinances, (2) the power to set up judicial precedents, and (3) the power to pass upon the constitutionality of laws, ordinances, etc.

(1) *The Power to Unify the Interpretation of Laws and Ordinances*

Art. 35 of the Law of Organization of Courts of 1910 provides that the President of the Supreme Court has the power to unify the interpretation of laws and ordinances and such powers as are incidental thereto. By virtue of this provision the Supreme Court became invested from its inception with a power of great importance. According to the Supreme Court Regulations, approved and promulgated by a presidential order dated May 29, 1919, which consolidated almost all the usages governing the transaction of business of that court up to that moment, such power included (1) the power to explain and answer doubtful legal points and (2) the power to rectify, in the interest of the State, any erroneous interpretation of laws or ordinances that might have been rendered by a public office, a legally recognized public juristic person, or a public official.⁸⁵ The usual procedure for the exercise of such power was for a public office, a legally recognized public juristic person, or a public official first to apply to the Court for interpretation on points of doubt arising from any law or ordinance in the course of performing official duties.⁸⁶ If the application was properly made in compliance with all the requirements, the Supreme Court had no right to refuse to give its interpretation. It was expressly provided that the fact that the matter for interpretation was unprovided for by any law or ordinance was no ground for refusal to interpret.⁸⁷ The cases for interpretation were assigned by the President of the Court to the heads of civil or criminal chambers for examination and interpretation, according to whether they related to civil or criminal matters. These cases together with the interpretations given by the heads of such chambers, would be passed to the heads and judges of all the civil or criminal chambers for opinions, as the circumstances might require. If the interpretations so given appeared to any of the chamber heads or judges to be inconsistent with any decision or former interpretation of the Court or to tend to create a new principle, such chamber head or judge would express his opinion to that effect. If there were two or more opinions expressed, a conference of the judges of

84. But in a case entitled only to one trial and one appeal such a judgment will become binding immediately after being rendered by the court of second instance.

85. Art. 202.

86. Art. 204.

87. Art. 205.

all the civil or criminal chambers would be held at the instance of any of those who expressed such opinions. Where a civil matter for interpretation was connected with criminal law or vice versa, the case and the interpretation given by the chamber head concerned would be passed to the heads and judges of all the civil and criminal chambers of the Court for opinions, and the same rule governing the expression of opinions and the holding of conferences would apply.⁸⁸ The matter for interpretation should be confined to abstract questions of law. Thus, where interpretation was asked for on a concrete case, the Supreme Court refused to comply with the request.⁸⁹ For to do so under such circumstances would mean to direct or interfere with the adjudication of cases of the lower courts, which is forbidden by the Law of Organization of Courts, 1910.⁹⁰ The cases for interpretation and the interpretations given were published in the Official Gazette of the Central Government.⁹¹ The interpretations so given and published were binding on all courts throughout the country, including the Supreme Court itself, as legal precepts to be followed in the adjudication of cases involving the same point.⁹² Where there were different interpretations given on the same point, the one latest in date would supersede all others.⁹³

Despite the establishment in 1928 of the Judicial Yuan of which the Supreme Court has since become one of the component parts, the power of the Supreme Court to unify the interpretation of laws and ordinances remains substantially the same. According to the Law of Organization of the Judicial Yuan, promulgated on October 20, 1928, and later amended and put into force on November 17 of the same year, the power to unify the interpretation of laws and ordinances vests in the Head of the Judicial Yuan. But the latter has to exercise such power in pursuance of the decisions reached in a conference of the President and chamber heads of the Supreme Court.⁹⁴ Thus, though nominally such power has been shifted into the hands of the Head of the Judicial Yuan, it is still by the Supreme Court that interpretations are given. However, under the present system some important changes have been brought about; they may be stated as follows:

1. The task of giving interpretations is undertaken by the Conference for the Unification of Interpretation of Laws and Ordinances, which forms a part of the Judicial Yuan and in which the Head of the Judicial Yuan and the President and all the chamber heads of the Supreme Court participate. The Head of the Judicial Yuan, or, in his absence,

88. Art 206.

89. INTERPRETATION OF SUPREME COURT, No. 98, Feb. 7, 1914.

90. Art. 35.

91. SUPREME COURT REGULATIONS, art. 210.

92. *Ibid.*, art. 203.

93. INTERPRETATION OF SUPREME COURT, No. 460, June 22, 1916.

94. Art. 4 (Originally Art. 3).

the Vice-Head of Judicial Yuan, or, in his absence, the President of the Supreme Court will act as the Chairman of the Conference. The quorum for such conference is two-thirds of the persons who have the right of participation. Decision is to be reached by a majority vote. Where opinions are equally divided, the question will be decided by the Chairman.⁹⁵

Where the Head of the Judicial Yuan has doubt about the propriety of the decision so reached, a plenary conference may be called by him for reconsideration of the matter. In such plenary conference the Head of the Judicial Yuan, the President, and all the chamber heads and judges of the Supreme Court will participate. The quorum for such conference is two-thirds of the persons who have the right to participate in it. Decision is to be reached by an absolute majority vote of two-thirds of the persons attending the conference. In case of opinions being equally divided, the Chairman, who will be the same person qualified to preside at the ordinary conference, will have the decisive vote.⁹⁶

2. An application for interpretation may be addressed either to the Judicial Yuan or to the Supreme Court. If addressed to the Judicial Yuan, the Head of the Judicial Yuan will pass it to the President of the Supreme Court, who will then assign it to one of the heads of civil or criminal chambers, as the case may be, according to the order relating to the distribution of cases. If addressed to the Supreme Court, it will be so assigned to one of the chamber heads without having to go through the Head of the Judicial Yuan. The interpretation given by the chamber head to whom the case is assigned will be passed to all the other chamber heads of the Court for opinion. If the majority of the chamber heads and the President of the Court concur in such interpretations, the President will submit it to the Head of the Judicial Yuan. If approved by the latter, it will be deemed the interpretation voted upon by the Conference for the Unification of Interpretation of Laws and Ordinances. Thus the Conference does not really take place as a matter of course, but is held only under exceptional circumstances.⁹⁷

If the majority of the chamber heads or the President of the Supreme Court cannot agree to, or have doubt about the propriety of, the interpretation so given, the President will petition the Head of the

95. RULES FOR THE UNIFICATION OF INTERPRETATION OF LAWS AND ORDINANCES AND THE MODIFICATION OF JUDICIAL PRECEDENTS BY THE JUDICIAL YUAN OF THE REPUBLIC OF CHINA, arts. 3, 8, Jan. 4, 1929.

96. *Ibid.*, art. 9.

97. *Ibid.*, arts. 4-6.

Judicial Yuan to convene the Conference for the Unification of Interpretation of Laws and Ordinances. Where it is the Head of the Judicial Yuan who disagrees with the interpretation so given, such conference may be called of his own initiative.⁹⁸ At first the Conference will take the form of an ordinary session in which the ordinary judges of the Supreme Court do not participate. It is only when the Head of the Judicial Yuan disapproves of the interpretation reached in such session that a plenary session with the ordinary judges of the Supreme Court as participants will take place.

It is interesting to note that the interpretations given by the Judicial Yuan of China through the Supreme Court have no parallel in other legal systems except that of Russia. According to Judah Zelitch, the Supreme Court of Russian Socialist Federative Soviet Republic (R.S.F.S.R.) also has the power to interpret laws. This power extends to all questions of substantive or procedural law, whether connected with concrete cases or not. The matters for interpretation may be submitted by litigants, the various departments or the presidium of the Supreme Court, the Procurator of the Republic or his assistant, or the lower courts. The interpretations are to be given by the plenum of the Court, which is composed of all the judges thereof. The quorum for the session of such a body is half of the entire membership. At the session, the presence of the Procurator of the Republic or his first assistant is required. The interpretations of the plenum of the Supreme Court are binding on all judicial institutions in the territory of the R.S.F.S.R.⁹⁹ Thus, it may fairly be said that in spite of differences in detail there is much resemblance between the Chinese and the Russian systems in general spirit.

(2) *The Power to Set up Judicial Precedents*

That the decisions of judicial tribunals other than the Supreme Court are under the present Chinese system devoid of the force of judicial precedents seems beyond doubt. But as to whether this holds true also of the decisions of the Supreme Court, there has been a good deal of theoretical dispute. By those who do not recognize in such decisions the force of judicial precedents, it has been held that such decisions partake of the nature of but one of three classes of things. First of all, such decisions have been considered as mere legal opinions of experts or jurists, which may serve to enlighten the judges in the adjudication of cases but have no binding force at all.¹⁰⁰ Viewed in such light, they exercise but a moral influence over the courts in all cases that come before them. Again, they have been held to be mere judicial usages

98. *Ibid.*, art. 7.

99. SOVIET ADMINISTRATION OF CRIMINAL LAW 65, 75, 85, 88 (University of Pennsylvania Press 1931).

100. CHEN, KING-KUNG, GENERAL PRINCIPLES OF CIVIL LAW 17-18.

(*Gerichtsgebrauch*), customs which the court may draw upon as a source of law.¹⁰¹ According to this view, they are binding on the court as a source of law only in civil cases where there are no express provisions applicable. There is no room for them in criminal cases or those civil cases covered by express provisions of codes or statutes. For in criminal cases no act is punishable in the absence of an express legal provision to that effect and the source of law is limited to code or statute,¹⁰² while in those civil cases covered by express provisions of codes and statutes, customs or usages are excluded from application.¹⁰³ Finally, the decisions of the Supreme Court have been relegated to the category of general principles of law.¹⁰⁴ This also means that they are only binding on the court as a source of law in civil cases. But, compared with the rôle which they would play according to the theory of judicial usages, their position here is much worse. For, as general principles of law, they are only applicable to civil cases in the absence of both express legal provisions and customs, and inasmuch as different persons may hold different rules to be general principles of law, they may not be followed by courts in the adjudication of cases as a result of free choice on the part of judges.

The above propositions are, however, untenable for three reasons. In the first place, there are in the statutes certain provisions which clearly indicate that the decisions of the Supreme Court partake of the nature of judicial precedents binding at least on itself. Following the example of the German and the Japanese systems,¹⁰⁵ the Law of Organization of Courts, 1910, provides that "if in the course of adjudication by any chamber of the Supreme Court as a court of final appeal a conflict arises between the interpretation of law given either by the same or some other chamber of the Court on the same point, the President of the Court shall according to the nature of the law in question convene a general conference of the civil or criminal chambers or of both civil and criminal chambers to decide the same."¹⁰⁶ The Law of Organization of Courts now in force provides in Art. 25 that in such a case the President of the Supreme Court shall request the Head of the Judicial Yuan to submit the matter to the decision of the Conference for the Modification of Judicial Precedents. Again, the Rules Governing the Unification of Interpretation of Laws and Ordinances and the Modification of Judicial Precedents provide

101. YU, CHIN-CHANG, *ELEMENTS OF CIVIL LAW* 28.

102. Article I of the Criminal Code provides: "An act is punishable as a crime only by virtue of express provision of law at the time of its commission."

103. Article I of the Civil Code provides: "Civil matters are governed in the absence of express provisions, by customs and, in the absence of customs, by general principles of law."

104. HU, CHANG-CHING, *GENERAL STUDY OF CHINESE CIVIL LAW* 36-37.

105. GERMAN *GERICHTSVERFASSUNGSGESETZ* (as it stood before World War II) § 136; JAPANESE *LAW OF ORGANIZATION OF COURTS*, art. 49.

106. Art. 37. This provision has been superseded by the Rules Governing the Unification of Interpretation of Laws and Ordinances and the Modification of Judicial Precedents.

among other things that where the Head of the Judicial Yuan deems it necessary to modify an interpretation or a judicial precedent, that is, a decision of the Supreme Court having become a precedent, he may pass the matter for discussion or study by the Supreme Court.¹⁰⁷ All these provisions point unmistakably to the fact that the decisions of the Supreme Court are binding on, and should be followed by, at least the said Court itself, as a matter of course, until their modification is approved by a conference specially constituted, in which a much greater number of judges than required for the rendering of a decision is to participate.

In the second place, the procedural practices in the country indicate that judicial tribunals other than the Supreme Court are required in the adjudication of cases to apply the law in such a way as is compatible with the decisions of the Supreme Court. Any deviation from such decisions will constitute a violation of law, which is a ground for reversing or modifying the judgment. This is even true of cases, which were at least very common prior to the promulgation of the present Civil Code in 1929, where such courts deviated from decisions of the Supreme Court which were of a creative nature, that is, decisions which, instead of merely interpreting legal provisions, create new rules that either fill the gaps or modify the content of a statute or ordinance or are concerned with matters not covered by any statute or ordinance at all. From this it may be concluded that the decisions of the Supreme Court are binding as judicial precedents not only on itself but also on all the inferior courts.

Finally, it may be said that there is a general psychological tendency on the part of both the bench and the bar toward regarding the decisions of the Supreme Court as judicial precedents binding on all the ordinary judicial tribunals of the country. This is manifested by the fact that lawyers often cite decisions of the Supreme Court in support of their contentions and the judges, with very few exceptions, will give judgments in accordance therewith as a matter of course, as if the binding effect of such decisions were already beyond any doubt. Such a state of affairs may serve to prove that the recognition of the Supreme Court decisions as judicial precedents binding on all ordinary judicial tribunals represents the majority opinion of the Chinese legal world, which, however unjustifiable it may be, will be determinative of the nature and status of such decisions, at least in practical application.

From the foregoing, it follows that the Supreme Court may be considered as having the power to set up judicial precedents which will be binding on itself and all the inferior courts until they are modified by a special body constituted for this purpose, namely, the Conference for the Unification of Interpretation of Laws and Ordinances.

107. Art. 10.

(3) *The Power to Pass upon the Constitutionality
of Laws and Ordinances*

By virtue of its power to unify the interpretation of laws and ordinances, the Supreme Court during the early years of the Republic declared in a few cases certain orders of the Government to be void on the ground of unconstitutionality. For instance, by an interpretation dated May 28, 1913, an order of the Ministry of Justice instructing the courts as to the proper law to be thenceforth applied in cases of kidnapping was held to be against the principle of judicial independence as embodied in the Constitution and, therefore, not binding on the courts. But no case was ever known where the Supreme Court refused to apply a certain statute or declare it void on the ground of unconstitutionality. The reason was that although the said court was invested with the power to unify the interpretation of laws and ordinances, including the fundamental law and governmental orders of a general nature, the Provisional Constitution of 1912 was silent as to whether any statute contrary to its provisions was void or whether the Supreme Court had the power to declare such statute void. Indeed, it was not until 1923 that the Supreme Court was formally endowed with the power to pass upon the constitutionality of statutes in a limited number of cases. In that year a permanent constitution was promulgated under the Peking regime. Among other things, it provided the following:

1. That a statute inconsistent with the Constitution is void; ¹⁰⁸
2. That the power over matters not expressly specified in the Constitution as falling within the jurisdiction of the Central Government or the provinces shall belong to the Central Government or the provinces according to whether such matters concern the former or the latter, and, in case of dispute, the question shall be decided by the Supreme Court; ¹⁰⁹ and
3. That a statute of a province in conflict with that of the Central Government is void, and, in case of doubt, the matter shall be determined by the interpretation of the Supreme Court. ¹¹⁰

All these provisions, taken synthetically, would seem to indicate that where dispute arises as to whether the Central Government or the provinces have exceeded the constitutional limits in having legislated on a matter not expressly specified in the Constitution as being within the jurisdiction of the Central Government or the provinces, or whether a law enacted by a province is in conflict with that of the Central Government so as to constitute an excess of the constitutional power, the Supreme Court has the power to pass upon the constitutionality of the statute in question. ¹¹¹

108. Art. 108.

109. Art. 26.

110. Art. 28.

111. WANG, SHIH-JIH, *COMPARATIVE CONSTITUTIONAL LAW* 591-592.

With the Revolution of 1926-1927 resulting in the establishment of the present government, the Supreme Court was divested of the power of passing upon the constitutionality of statutes. At first the Constitution of 1923 was discarded as an instrument of the old regime and the Provisional Constitution of 1912 was resuscitated temporarily. Thus the Supreme Court was restored to its original position with regard to constitutional questions. In 1931 the Provisional Constitution for the Period of Political Tutelage¹¹² was promulgated and put into force. According to this Constitution, the power to interpret and pass upon the constitutionality of statutes vests in the Central Executive Council of the Kuomintang Party, which acts according to Art. 30 of the Constitution as the representative of the National Convention, the constitution-making body.¹¹³

In the meantime, much discussion has taken place as to where the power of passing upon the constitutionality of statutes should vest. There are not a few who believe that such a power should be given to the Supreme Court.¹¹⁴ The final draft of the Constitution prepared by the Legislative Yuan provides, however, that it should be exercised by the Judicial Yuan.¹¹⁵ It was anticipated by many that with such a provision becoming law, the Supreme Court, as a component part of the Judicial Yuan, might have some share in the solution of constitutional questions. But the New Constitution adopted last year did not follow the draft constitution on this point very closely. Although it provides in Arts. 78 and 173 that the interpretation of the Constitution shall be undertaken by the Judicial Yuan, it says elsewhere (Art. 79, paragraph 2) that there shall be in the Judicial Yuan "Grand Justices," who shall attend to the interpretation of the Constitution and the unification of interpretation of laws and ordinances. The New Organic Law of the Judicial Yuan, adopted by the Legislative Yuan in March, 1947, to become effective simultaneously with the New Constitution, further provides in Art. 3 that there shall be in the Judicial Yuan a Conference of Grand Justices, composed of nine such justices, and at such conference the Head of the Judicial Yuan shall preside as the chairman. But the same law leaves the qualifications of the Grand Justices to future legislation. There has been much discussion as to who shall be quali-

112. According to the plan laid down by the late Dr. Sun Yat-Sen, founder of the Kuomintang Party, the political development of China should be divided into three periods, namely, (1) the military period, (2) the period of political tutelage under the Kuomintang Party, and (3) the period of constitutional government.

113. Arts. 84-85.

114. In 1925 a group of scholars submitted to the Commission for the Drafting of National Constitution instituted by the Peking Government a bill for the "unification of judicial power," proposing to invest the Supreme Court with the power of interpreting the Constitution. (Law Critic, No. 116, pp. 20 *et seq.*) The same proposal was also made by others. See, for example, TUNG, KONG, A REVIEW OF THE LEGAL SYSTEM OF CHINA DURING THE LAST THIRTEEN YEARS, 2 CHINA LAW REVIEW (Chinese issue) 113 *et seq.*

115. Art. 142 of the Draft of May 5, 1936.

fied for the office of a Grand Justice. What share, if any, the Supreme Court judges will have in the interpretation of the New Constitution is still something about which nothing definite can be said.¹¹⁶

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116. This is not the place to go into the details of the Chinese constitutional theory and system, which would call for a separate article. But it may not be out of place to point out some of the problems which may arise after the New Constitution comes into force in the near future. One of these problems will be in what way the Grand Justices will pass upon the questions of constitutionality. Will they entertain cases of litigation involving such questions, or merely give answers in response to applications for interpretations on abstract questions of constitutional law as the Judicial Yuan used to do in response to applications for interpretations on laws and ordinances under the existing system or, sit as a court for constitutional litigation, on the one hand, and give interpretations on abstract questions of constitutional law on the other? The New Organic Law of the Judicial Yuan, to become effective simultaneously with the New Constitution, seems to indicate that functioning as a body by way of "Conference" and being charged, as arts. 78 and 79 of the New Constitution provide, with the duty of unifying the interpretations not only of the Constitution, but also of ordinary laws and ordinances, the Grand Justices will most likely serve as an organ for giving answers on abstract questions of constitutional law. If this should happen, who would take care of cases of litigation involving constitutional questions? Could the ordinary courts or special tribunals such as the Administrative Court or the Commission for the Disciplinary Punishment of Government Officers have any jurisdiction over such cases? Could they decide such cases according to their own opinions or precedents or should they wait until there is an interpretation given by the Grand Justices on the point at issue? If the former course should be taken, what should be done in case of difference between the interpretations adopted by the ordinary courts or special tribunals and the Grand Justices?